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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JOHN N. BROWN and the
ATTORNEY GENERAL OF THE
STATE OF OKLAHOMA,

Petitioners,

vs.

LONNIE JOE DUTTON

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

1. Whether a federal habeas court can review an issue which the state appeals court refused to review because the defendant's attorney failed to make an offer of proof.

2. Whether a federal habeas court can then review the issue mentioned above (which has been raised during state post-conviction proceedings) when the state district court had reviewed the issue on the merits, but the state appeals court refuseed to consider the issue because of the doctrine of res judicata.

EDITOR'S NOTE:

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FOR THE TENTH CIRCUIT

The Petitioner, the State of Oklahoma, and the Attorney General of Oklahoma, Robert H. Henry, (hereinafter referred to as the "State") pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this matter.

OPINIONS BELOW

The decision of the United States Court of Appeals from which certiorari is sought is reported as Dutton v. Brown, 812 F.2d 593 (10th Cir.1987) (en banc). This opinion was filed on February 19, 1987. (App. A).

This opinion reversed the order and judgment of the United States District Court for the Western District of Oklahoma, Dutton v. Brown, No. CIV-85-1661-E (W.D.Okla. July 12, 1985) (App. B).

The opinion of the Oklahoma Court of Criminal Appeals on the post-conviction in this case is at Dutton v. State, No. PC-84-665 (Okla.Crim.App. Feb. 8, 1985) (App. C), cert. denied, 105 S.Ct. 2347 (1985), which affirmed the findings of fact and conclusions of law of the District Court of Oklahoma County in State v. Dutton, No. CRF-75-105, (Aug. 30, 1984) (App. D).

The opinion of the case on direct appeal is reported as Dutton v. State, 674 P.2d 1134 (Okla.Crim.App. 1984), cert. denied, 467 U.S. 1256 (1984) (App. E).

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty or property, without due process of law . . . .

Okla.Stat.Ann.tit. 12, § 2104 (West 1980) states in pertinent part:

> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of a party is affected, and:
>
> . . . .
>
> If the ruling is one excluding evidence, the substance of the evidence

was made known to the judge by offer or was apparent from the context within which questions were asked.

STATEMENT OF THE CASE

Lonnie Joe Dutton, (hereinafter referred to as the "Defendant") was convicted in the district court of Oklahoma County after a trial by jury and was given a death sentence by the same jury. The trial and sentencing took place on May 7-10, 1979.

At trial, evidence was presented that on January 2, 1979, the Defendant entered a bar in south Oklahoma City, waited for the other customers to leave, pulled out a loaded gun, and murdered one of the persons behind the bar, Dale Gray, and shot and paralyzed the other person present, Wanda Honeycutt, who was Mr. Gray's mother (Tr. 210-12; 362-67).

The Defendant was positively identified at trial by Mrs. Honeycutt (Tr. 211, 361). The Defendant also signed a

written statement given to police in which he admitted robbing the bar and shooting Mr. Gray and Mrs. Honeycutt (Tr. 344-59). The Defendant also told officers that he had gotten blood on the overalls he had been wearing and had discarded them by the side of a nearby bar. The police recovered the blood-stained overalls outside the bar referred to by the Defendant (Tr. 279, 282, 347-48).

During the second stage of the trial, evidence was produced which showed that the Defendant had participated in a robbery of another bar the day after the murder previously referred to, and had forced the waitress and manager to the floor with a knife. As these two people lay on the floor, the Defendant stuck his knife into their backs and tried to convince his accomplice that they should kill the two people (Tr. 445-51).

Evidence was also presented that on the day before the murder for which the Defendant was convicted, the Defendant and the same accomplice entered another bar. The waitress at that bar was also murdered (Tr. 460-67). The Defendant signed another statement admitting to his participation in this robbery, but contended that his accomplice was the person who shot and killed the waitress at this bar (Tr. 479).

In the Defendant's case during the second stage of the trial, the Defendant's attorney attempted to call the Defendant's mother as a witness, but the trial court would not permit her to testify because she had violated the rule of sequestration, which had been invoked by the Defendant's attorney at the beginning of trial (Tr. 208, 485).

The jury found the existence of two aggravating circumstances, that the

Defendant knowingly created a great risk of death to more than one person, and the existence of the probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society, and imposed the death sentence on the Defendant.

The Defendant then appealed his case to the Oklahoma Court of Criminal Appeals. The conviction and sentence were unanimously affirmed on January 6, 1984. Dutton v. State, 674 P.2d 1134 (Okla.Crim.App. 1984). (App. E).

In that appeal the Defendant contended that the trial court erred in refusing to allow his mother to testify during the sentencing stage. 674 P.2d at 1140. The Court of Criminal Appeals rejected this claim, stating as follows:

> We are unable to discern from the record what testimony in mitigation appellant's mother would have presented. The exclusion of evidence is not ground for error unless a party makes a record of the proposed evi-

> dence or the proposed evidence is obvious from the context. 12 O.S. 1981, § 2104(A)(2) (App. E, 18e).

Id. at 1140.

The Defendant then filed a Petition for a Writ of Certiorari with the United States Supreme Court in Case No. 83-6500, and on June 18, 1984 this Court denied the Petition. Dutton v. Oklahoma, 467 U.S. 1256 (1984).

The Defendant then filed an application for post-conviction relief in the district court of Oklahoma County, and that application was denied by the district court on August 29, 1984, in an unreported opinion (App. D). In the findings of fact and conclusions of law filed in that case by the district court, the district court discussed the Defendant's allegation as to what his mother would have testified to, but held that the "testimony of the Mother would not excuse the Defendant from the crime

which a jury of citizens - his peers - found him guilty." (App. D, 7d).

The Defendant then appealed the denial of this application for post-conviction relief and the Court of Criminal Appeals unanimously affirmed the denial of the post-conviction application in an unreported opinion. Dutton v. State, No. PC-84-665 (Okla.Crim.App. Feb. 8, 1985) (App. C). The court discussed the Defendant's allegation that his counsel was ineffective because of certain reasons, including the failure to have the testimony of the mother presented at trial. The court stated that it had "considered the entire record on appeal, and failed to find merit in the Petitioner's argument. The doctrine of res judicata in post-conviction proceedings bars consideration of issues which have been or could have been raised on appeal". (App. C, 3c). The court then

stated, with regard to the Petitioner's entire appeal:

> Having determined that all errors raised by the Petitioner are barred from consideration by the doctrine of res judicata, and further finding that consideration of the issues do not reveal the necessary denial of effective assistance of counsel to merit reversal or modification of the judgment and sentence, this Court finds the denial of post-conviction relief was proper, and should be, and hereby is, AFFIRMED. (Emphasis added).

(App. C, 4c).

The Defendant then filed a second Petition for a Writ of Certiorari with the United States Supreme Court in Case No. 84-6490, and on May 17, 1985, this Court again denied his Petition. Dutton v. Oklahoma, 105 S.Ct. 2347 (1985).

On June 26, 1985, the Defendant filed a Petition for Habeas Corpus in the United States District Court for the Western District of Oklahoma. On July 2, 1985, an evidentiary hearing was held pursuant to the Defendant's request. On July 12, 1985, the District Court

issued findings of fact and conclusions of law which rejected the Defendant's contention, and denied the petition. Dutton v. Brown, No. CIV-85-1661-E (W.D. Okla. July 12, 1985) (App. B).

The Defendant then appealed the denial of his Petition for a Writ of Habeas Corpus to the United States Court of Appeals for the Tenth Circuit. That court initially affirmed the denial of the Defendant's petition. Dutton v. Brown, 788 F.2d 669 (10th Cir. 1986). However, the Circuit granted rehearing en banc, and after argument, on February 19, 1987 the entire panel issued an opinion in which it reversed the denial of the Defendant's petition as to the second stage of the Defendant's trial. Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987).

In the briefs which it filed in that appeal, the State contended that

the Defendant's failure to comply with a valid state procedural rule (that the Defendant had not made a valid offer of proof at the time the trial court ruled that the violation of the rule of sequestration prevented the Defendant's mother from testifying) prevented a federal court from reviewing the Defendant's state court conviction, citing Wainwright v. Sykes, 433 U.S. 72 (1977) in its progeny.

The Tenth Circuit vacated the Defendant's sentence, however, on the ground that the ruling of this Court in Skipper v. South Carolina, 106 S.Ct. 1669 (1986), was applicable to the Defendant's case.

With regard to the State's contention that the Skipper allegation could not be challenged because of the Defendant's failure to comply with the state procedural rule concerning offer of proof, the court held:

> We are aware that Petitioner may not have challenged Mrs. Dutton's exclusion on constitutional grounds on direct appeal. It is clear, however, that it is raised in the application for post-conviction relief and con-

> sidered by the state district court. Record Vol. entitled "Criminal Appeal - Original Record" at 3 and 33. In affirming, the Oklahoma Court of Criminal Appeals found no procedural bar concerning this issue. Record vol. I. at 19-20. (Emphasis added).

812 F.2d at 599, n. 7. (App. A, 25a).

REASONS WHY THE PETITION SHOULD BE GRANTED

SINCE THE OKLAHOMA COURT OF CRIMINAL APPEALS HELD ON DIRECT APPEAL THAT THE DEFENDANT HAD NOT COMPLIED WITH A VALID STATE PROCEDURAL RULE BECAUSE HE HAD NOT MADE A VALID OFFER OF PROOF, AND BECAUSE THAT COURT LATER HELD THAT ALL ISSUES WERE BARRED BY THE DOCTRINE OF RES JUDICATA, THE TENTH CIRCUIT ERRED BY REVIEWING THE DEFENDANT'S CONTENTION CONCERNING THE REFUSAL OF THE TRIAL COURT TO ALLOW THE PETITIONER'S MOTHER TO TESTIFY.

The United States Court of Appeals for the Tenth Circuit ruled that the state trial court's refusal to allow the Defendant's mother, Jean Dutton, to testify during the second state of trial constituted error because it excluded relevant mitigating testimony. The

State, however, contends that Mrs. Dutton was prohibited from testifying due to the Defendant's failure to comply with a valid state procedural requirement, and this issue is therefore, barred from federal habeas review.

At the beginning of the trial, the trial court invoked the rule of sequestration at the Defendant's request (Tr. 208). When Mrs. Dutton attempted to testify, the court held that since Mrs. Dutton had been present during the trial, including the second stage, she would be prohibited from testifying (Tr. 484-86). The defense counsel then failed to make an offer of proof as to the contents of Mrs. Dutton's potential testimony. (Tr. 485). Not only was there no offer of proof, but what Mrs. Dutton would have testified to was not obvious from the context of the record at the time she attempted to testify.

Oklahoma's evidence code, Okla. Stat.Ann.tit.12, § 2104(A) (West 1980), echoes the federal rule, see Fed.R.Evid. 103(a), and states that error on appeal may not be predicated upon a ruling which admits or excludes evidence, unless a substantial right of a party is affected, and if the ruling is one excluding evidence, the substance of the evidence was made known to the judge "by offer or was apparent from the context within which the questions were asked."

In the present case, the State respectfully submits that the Oklahoma Court of Criminal Appeals applied this procedural rule on direct appeal, and found that since the Defendant's attorney did not make an offer of proof as to what Mrs. Dutton's testimony might be, error could not be predicated on this issue. The court stated as follows:

> In a capital case, this Court will carefully review the record and consider all matters presented which are supported by the record . . .
>
> We are unable to discern from the record what testimony in mitigation appellant's mother would have presented. The exclusion of evidence is not ground for error unless a party makes a record of the proposed evidence or the proposed evidence is obvious from the context. 12 O.S. 1981, § 2104(A)(2).

Dutton v. State, 674 P.2d 1134, 1140 (Okla.Crim.App. 1984). (App.E, 17e-18e).

As noted previously, the Tenth Circuit conceded that the Defendant had not properly preserved his constitutional issue on direct appeal. Dutton v. Brown, 812 F.2d at 599, n. 7. However, that court held that since the district court had considered the issue during post-conviction proceedings and, "[i]n affirming, the Oklahoma Court of Criminal Appeals found no procedural bar concerning this issue", the federal court could consider the issue on the merits.

The State contends that the Court of Appeals was in error. The order of the Court of Criminal Appeals, which affirmed the denial of the Defendant's application for post-conviction relief, flatly stated that "all errors raised by the Petitioner are barred from consideration by the doctrine of res judicata, ..." (App. C, 4c). Therefore, the Court of Criminal Appeals, after having once rejected the Defendant's claim that his rights were violated because the trial court refused to allow his mother to testify because of the failure of his lawyer to make an offer of proof, now held that his second attmept to present this issue was barred by the doctrine of res judicata.

It is now settled that a State can insist that all claims be presented on direct appeal. Smith v. Murray, 106 S.

Ct. 2661 (1986).* Under Oklahoma law, all issues which have been, or should have been, presented during the direct appeal, are barred by the doctrine of res judicata. See Cartwright v. State, 708 P.2d 592, 594-95 (Okla.Crim.App. 1985); Jones v. State, 704 F.2d 1138, 1140 (Okla.Crim.App. 1985); Coleman v. State, 693 P.2d 4, 5 (Okla.Crim.App. 1985). Furthermore, in Estate of Severns v. Severns, 650 P.2d 854, 856 (Okla. 1982) the Oklahoma Supreme Court held:

> Determinations made on a prior appeal of the cause are res judicata of the issues decided therein. Rush v. Champlin Ref. Co., 357 P.2d 984 (1961). The decision of the appellate court on an issue of law becomes the law of the case once the decision is final and unreversed, in all sub-

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*The issue of whether the Defendant's mother should have been allowed to testify cannot be reviewed under the principles announced in Kimmelman v. Morrison, 106 S.Ct. 2575 (1986), since the Tenth Circuit held that the Defendant's attorney was not ineffective regarding the events surrounding the calling of the mother as a witness. 812 F.2d at 597-98.

> sequent stages. Berland's, Inc. of Tulsa v. North Side Village Shopping Center, Inc., 447 P.2d 768 (1968). As early as 1915 it was succinctly stated that NO question expressly decided or impliedly determined on a former appeal can be reversed on a second appeal between the same parties in regard to the same subject matter. Wellsville Oil Co., v. Miller, 48 Okla. 386, 150 P. 186, Affirmed 37 S.Ct. 362, 243 U.S. 6, 61 L.Ed. 559 (1915). This line of authority has been widely recognized as a necessity to insure an end to litigation. (Emphasis original)

The State also contends that the Court of Criminal Appeals, in its opinion on the direct appeal, did not commit constitutional error when it held that the failure of the Defendant's attorney to make an offer of proof barred review of the alleged error regarding the prevention of the mother from testifying.

This case differs dramatically from those in Skipper v. South Carolina, 106 S.Ct. 1669 (1986). In that case it was readily apparent from the record what evidence was excluded by

the trial court. The defendant's attorney clearly advised the trial court what the proposed testimony was to be. See the Joint Appendix in this Court in Skipper v. South Carolina, No. 84-6859, App. 10-11 (Tr. 1096-98). In the present case, the trial court was not apprised of the contents of Mrs. Dutton's proposed testimony. Therefore, the Court of Criminal Appeals correctly applied the offer of proof rule in ruling that the refusal to permit Mrs. Dutton to tesify was not error.

Significantly, in Skipper, the Supreme Court observed that not all facts of a defendant's life must be treated as relevant and potentially mitigating. Skipper v. South Carolina, 106 S.Ct. at 1672, n. 2. Therefore, since Mrs. Dutton's testimony might have consisted of matters that were not mitigating, constitutional error was not committed by

the trial court, in the absence of compliance with the state procedural rule requiring an offer of proof. Cf. California v. Brown, 107 S.Ct. 837, 839 (1987) (defendant must be allowed to introduce any "relevant" evidence in his behalf).

Certainly the offer of proof requirement is a valid procedural rule. Cf. Fed.R.Evid. 103(a). It is enforced by the Tenth Circuit in federal cases. See United States v. Rayco, Inc., 616 F.2d 462, 464 (10th Cir. 1980). It is particularly important in a death case where the trial judge has the right to be advised what the proferred testimony would be.

Smith v. Murray, supra, 106 S.Ct. 2661, was itself a death penalty case involving purported error regarding a witness who testified in the second stage of the death penalty case alleged-

ly in violation of the holding in Estelle v. Smith, 451 U.S. 454 (1981). This Court held that the defendant could not raise this issue since he had not complied with the Virginia procedural rule requiring all trial errors to be presented on direct appeal.

The State therefore contends that since the Oklahoma Court of Criminal Appeals applied a valid state procedural bar, this contention cannot be reviewed on federal habeas corpus. See Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977).

This Petition should be granted in the interests of requiring criminal defendants to raise all issues on direct appeal, and to comply with state procedural rules which make trial attorneys advise trial courts what the evidence is which is allegedly being erroneously excluded.

CONCLUSION

For the reasons stated, the State respectfully requests that this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

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* Counsel of Record

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LONNIE JOE DUTTON	)	
	)	
Petitioner-Appellant,	)	
	)	
vs.	)	
	)	
JOHN N. BROWN and the ATTORNEY GENERAL OF THE STATE OF OKLAHOMA	)	No. 85-2115
	)	
Respondents-Appellees	)	
	)	
OKLAHOMA CRIMINAL DEFENSE LAWYERS ASSOCIATION,	)	
	)	
Amicus Curiae.	)	

[Filed February 19, 1987]

ON REHEARING EN BANC

BALDOCK, Circuit Judge.

Lonnie Joe Dutton (petitioner) filed a petition for a writ of habeas corpus in the United States District

Court for the District of Oklahoma after exhausting all his state remedies. He contends that his conviction for first degree murder and death sentence violated various provisions of the federal Constitution. The district court denied his petition, and a panel of this court affirmed that denial. That decision was vacated when the majority of the active judges of the circuit voted to have the appeal determined by an en banc panel. We reverse the district court and direct the issuance of a writ of habeas corpus.

I.

Petitioner was arrested and charged with the January 1977 murder of Carl Eugene Gray. The evidence presented at tht state trial established that petitioner and Carl Morgan planned to rob a bar in Oklahoma City. While Morgan waited in a car, petitioner went into the bar and ultimately shot and killed

the proprietor, Gray, and severely wounded Gray's mother.

Petitioner was tried in the District Court of Oklahoma County, Oklahoma. At the beginning of the trial, petitioner's attorney requested the sequestration of witnesses. Responding to this request, the trial judge cautioned that "anyone who expects to testify in this case remain outside the courtroom subject to call. You're admonished not to discuss your testimony, one with the other. If you remain here, you may not be allowed to testify. Counsel is on notice, look after your own witnesses." Record vol. I at 208. Jean Dutton (Mrs. Dutton), petitioner's mother, attended the trial despite this caution.

Dutton was convicted of murder in the first degree. Oklahoma law provides for a separate sentencing proceeding

whereby the same jury which considered guilt determines whether a defendant should be sentenced to death or life imprisonment. Okla. Stat. tit. 21, § 701.10 (West 1983).[1] During this senten-

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[1]Section 701.10 provides as follows:

Upon conviction or adjudication of guilt of a defendant of murder in the first degree, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by a trial judge before the trial jury as soon as practicable without presentence investigation. If the trial jury has been waived by the defendant and the state, or if the defendant pleaded guilty or nolo contendere, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, evidence may be presented as to any mitigating circumstances or as to any of the aggravating circumstances enumerated in this act. Only such evidence in aggravation as the state has made known to the defendant prior to his trial shall be admissible. However, this section shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Oklahoma. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

cing phase, Mrs. Dutton was called to testify on behalf of the defense. The trial judge, sua sponte, prohibited Mrs. Dutton from testifying because she had attended the trial. Thereafter, the defense rested, and petitioner was sentenced to death by lethal injection.

Petitioner's conviction and sentence were affirmed by the Oklahoma Court of Criminal Appeals and a petition for writ of certiorari to the United States Supreme Court was denied. Dutton v. State, 674 P.2d 1134 (Okla.Crim. App. 1984), cert. denied, 467 U.S. 1256 (1984). He then sought relief pursuant to Oklahoma's Post-Conviction Procedure Act, Okla. Stat. Ann. tit. 22, § 1081 (West 1986), in the District Court of Oklahoma County, Oklahoma, which was denied. Post-conviction relief also was denied by the Oklahoma Court of Criminal Appeals, Record vol. I at 19, and the

United States Supreme Court again denied certiorari. Dutton v. Oklahoma, 471 U.S. 1111 (1985). The present federal habeas corpus proceeding was then instituted by Dutton.

The issues before this court are (1) whether the state trial court improperly excused a venireman because of his views on the death penalty; (2) whether the prosecutor's closing argument was improper; (3) whether petitioner was denied effective assistance of counsel at his trial; and (4) whether the state trial judge improperly excluded the testimony of petitioner's mother in the sentencing proceeding. We address these issues seriatim.

II.

A. Exclusion of Venireman.[2]

Petitioner argues that a venireman was improperly excused for cause because

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[2]We agree with the earlier panel's disposition of this issue and incorporate below the panel's discussion of it.

he expressed reservations about the death penalty. The record indicates, however, the prospective juror stated that his consideration of the evidence of guilt would be colored by the possibility he might be called upon to impose the death penalty. Thus, he was excused, not because he would not impose the ultimate penalty, but because he might not be able to base a verdict of guilt or innocence solely upon the evidence.

The crucial inquiry is whether the venireman could follow the court's instructions and obey his oath, notwithstanding his views on capital punishment. Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). While a prospective juror cannot be excused simply for expressing reservations about the death penalty, Witherspoon v. Illinois, 391 U.S. 510, 88 S.

Ct. 1770, 20 L.Ed.2d 776 (1968), such is not this case. This venireman was excused because he candidly admitted that he would not be able to consider the question of guilt separate from the death penalty. Consequently, he raised doubts whether he could follow the court's instructions and impartially determine the basic issue. His excusal was not prejudicial.

B. Prosecutor's Remarks

Petitioner argues the prosecutor made improper remarks in his closing argument to the jury. In response to petitioner's closing argument, the prosecutor said:

> First of all, [Defense Counsel] argues that the final decision is yours, and of course, to some degree it is. But you are, as I am, as Judge Theus is, as all the courts are, part of the process. We are not functioning as individuals. I am not here as Andy Coats. I am here as the District Attorney.
>
> And you are not here in your individual capacities. You are here as the

> jury. And Judge Theus is not our good friend, Harold, off the Bench. He is his Honor, Judge Harold Theus, when he is in this Courtroom.
>
> And we are all part of the law and it is the law that makes us work. So it has to be in that attitude, in that frame of mind, that you approach the problem.

He challenges these remarks on the basis of the Supreme Court's ruling in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985). In Caldwell, the Court held it "constitutionally impermissible" for a prosecutor to suggest to a jury that the ultimate responsibility for the imposition of the death penalty did not rest with the jury but with the appellate court.

We begin by noting that petitioner's counsel did not object to these remarks at trial, and they are challenged for the first time in his habeas appeal. Under Oklahoma law, error of this nature must be raised by objection at trial, or it is waived. Smith v.

State, 727 P.2d 1366 (Okla. Crim. App. 1986). Additionally, failure to raise the issue on direct appeal bars it from being raised at a later time. Cartwright v. State, 708 P.2d 592, 593 (Okla. Crim. App. 1985), cert. denied, 106 S.Ct. 837 (1986). A preliminary issue, therefore, is whether petitioner defaulted his constitutional claim by failing to raise it at trial and pursue it on appeal.

A federal habeas court evaluates the failure to preserve a claim at trial and appellate defaults[3] under the same standard. Smith v. Murray, 106 S.Ct. 2661, 2665 (1986). In order to obtain review of a defaulted constitutional claim, a federal habeas petitioner must

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[3]We express no opinion as to the appropriate standard to be applied when a defendant's counsel decides not to appeal. See Murray v. Carrier, 106 S.Ct. 2639, 2648 (1986).

show cause for the procedural default and prejudice attributable thereto. Wainwright v. Sykes, 433 U.S. 72, 87 (1977); Murray v. Carrier, 106 S.Ct. 2639, 2644 (1986). We believe cause existed for the procedural default because trial counsel, at the time of trial in 1979, could not have known that the prosecutor's remarks might have raised constitutional questions. The law petitioner relies on did not become established until the Caldwell decision in 1985. We cannot expect trial counsel "to exercise extrordinary vision or to object to every aspect of the proceeding in the hope that some aspect might mask a latent constitutional claim." Engle v. Isaac, 456 U.S. 107, 113 (1982). In Reed v. Ross, 468 U.S. 1, 17 (1983), the Court ruled that cause exists for defense counsel's failure to raise an issue when a subsequent Supreme Court

decision articulates a constitutional principle that had not been recognized previously. Consequently, the failure of counsel to raise a constitutional issue reasonably unknown to him satisfied the "cause" requirement. Id. at 14. Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986) (reaching the same conclusion in a case also involving a Caldwell defense). We also conclude that the alleged error would be prejudicial, if valid, and therefore turn to the merits of the issue.

It is clear that, when taken in context, the statement of the prosecutor was not constitutionally impermissible. The statement was not designed to, nor did it, suggest to the jury that it was not ultimately responsible for deciding Mr. Dutton's punishment. The prosecutor merely underscored that the jury was part of the whole system of justice, and

within that system it had a grave responsibility. Indeed, the tenor of the remainder of the closing was that the crucial determination of punishment was the sole function of the jury. Thus, we hold that no prejudice resulted to the petitioner as a result of this comment.

C. Assistance of Counsel

Petitioner alleges he was denied effective assistance of counsel because his court-appointed trial lawyer neither adequately investigated possible sources of mitigating evidence nor offered such evidence to the jury during the sentencing proceeding. He also argues that his attorney failed to request jury instructions on mitigating evidence and to advise his mitigating witness, Mrs. Dutton, to remain outside the courtroom after the court ordered witness seclusion. As discussed below, these alleged deficiencies, viewed either individually

or collectively, do not constitute ineffective assistance of counsel. The sixth amendment to the United States Constitution explicitly entitles one accused of a crime "to have the assistance of Counsel for his defense." The Supreme Court has recognized this provision means the right to "effective" assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970). In Strickland v. Washington, 466 U.S. 668 (1984), the Court set forth guidelines for determining whether a criminal defendant was deprived of effective assistance of counsel. The Court instructed that reversal is required only when a defendant demonstrates that (1) counsel's performance was deficient and (2) the deficiency prejudiced his defense. Id. at 687.

To prove deficient performance, "the defendant must show that counsel's

representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. In assessing attorney performance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance ...." Id. at 689. Bearing in mind that this is a "highly deferential" review, id., an attorney's conduct must be evaluated in light of the circumstances facing him at the time of trial. A court which makes this evaluation must be especially vigilant to avoid the "distorting effects of hindsight." Id.

Although the assessment of attorney representation is to be based on an objective standard, ultimately, the decision is left to the "good sense and discretion" of the reviewing court. McMann v. Richardson, 397 U.S. at 771. Thus, any conclusion will be influenced

significantly by the subjective reactions and personal judgment of the reviewing judge or panel. Denton v. Ricketts, 791 F.2d 824, 827 (10th Cir. 1986). Though prevailing norms of practice as embodied in bar association standards are helpful, whether a particular attorney's conduct falls within the boundaries of "reasonable professional assistance" will depend upon the particular facts and circumstances of a case. In this case, every court which considered the question (both the Oklahoma district court and court of appeals as well as the federal district court and a panel of this court) found trial counsel's performance to be "effective." After reviewing the trial record, we agree with that assessment.

Petitioner asserts that his trial counsel was ineffective because, although counsel was aware that Mrs.

Dutton would be called as a mitigating witness, he failed to exclude her from the courtroom after the sequestration order. Petitioner's attorney requested the sequestration order at the beginning of the guilt proceeding, but assumed it applied only to that proceeding. Based on that assumption, he permitted Mrs. Dutton to attend the guilt proceeding. He also permitted her to attend the sentencing proceeding because an exclusion order had not been requested at its commencement.

When petitioner's attorney called Mrs. Dutton as a witness, the prosecuting attorney did not object. Nevertheless, the trial judge immediately halted the proceedings and called the attorneys into his chambers to discuss the matter off the record. When the proceedings resumed, the trial judge ruled that Mrs. Dutton would not be allowed to testify

due to her violation of his sequestration order. Petitioner's attorney objected and argued that the sequestration order was not applicable to the sentencing proceeding and that the expected testimony would not relate to any evidence presented during the guilt phase. The judge, however, adhered to his initial ruling.

Although it would have been prudent for counsel to have requested a clarification of the sequestration order at the beginning of the trial, we cannot conclude that counsel's failure to exclude Mrs. Dutton from the courtroom rendered his assistance ineffective. There was a reasonable basis for his belief the sequestration order would not apply to the sentencing proceeding. As previously noted, Oklahoma law provides for a bifurcated trial for death penalty cases. Okla. Stat. Ann. tit. 21, §

701.10. That statute clearly states "separate sentencing proceeding" and, therefore, it was reasonable for counsel to believe the rule of sequestration applied only to the proceeding in which it was invoked, i.e., the guilt proceeding. The prosecution may have shared that belief because it did not object to the mother's testimony. In any event, whether an order of sequestration applies to both parts of a bifurcated trial is unsettled[4] and counsel's belief does not constitute ineffective assistance of counsel.

Petitioner also argues that the circumstances of his past life should have been brought to the attention of

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[4]Law on this point is virtually nonexistent. We note, however, that the Louisiana legislature found it necessary to explicitly state in its death penalty statute that a sequestration order applies to the sentencing proceeding. State v. Toomer, 395 So.2d 1320, 1334-35 (La. 1981) (quoting La. Code Crim. Proc. art. 905.1(A)).

the jury and that his attorney was ineffective because he did not adequately investigate or present mitigating evidence.[5] Trial counsel's strategy for the sentencing proceeding was to focus on petitioner's predisposition, due to certain character defects, towards the dominating influence of older men. This was to be shown primarily through the testimony of petitioner's mother. We cannot fault counsel for failing to anticipate the unexpected, i.e., the trial court's sua sponte exclusion of Mrs. Dutton. United States v. Vader, 630 F.2d 792, 794 (10th Cir.), cert.

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[5]At trial, petitioner's counsel became aware of petitioner's psychological problem and his psychiatric medical history. Counsel moved for a psychiatric evaluation and for a continuance to review the medical documents he obtained from hospitals in which petitioner had been committed. Record vol. I at 193-202.

denied, 449 U.S. 1037 (1980). Although more could have been done to investigate sources of mitigating evidence, we agree with the conclusion reached by the many judges that have already reviewed this issue that trial counsel's preparation and trial strategy satisfy the sixth amendment's guarantee of effective assistance of counsel.

Petitioner's final argument in support of his theory of ineffective assistance of counsel is that trial counsel failed to request jury instructions on mitigating evidence. We note that neither the prosecution nor petitioner's attorney submitted instructions for either the guilt or the sentencing proceeding. The instructions given by the

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[6]The court instructed the jury as follows:

You are instructed that mitigating circumstances are not specifically enumerated in the statutes of this State but the law of this State sets up cer-

tain minimum mitigating circumstances you shall follow as guidelines in determining which sentence you impose in this case. You shall consider any or all of these minimum mitigating circumstances which you find apply to the facts and circumstances of this case. You are not limited in your consideration to these minimum mitigating circumstances. You may consider any additional mitigating circumstance, if any, you find from the evidence in this case. What are and what are not additional mitigating circumstances is for you the jury to determine.

The following, if true, would be the minimum mitigating circumstances as provided by law to be considered by you:

1. The defendant has no significant history of prior criminal activity;

2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

3. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act;

4. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct;

5. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor;

6. The defendant acted under duress or under the domination of another person;

court listed eight possible mitigating factors, including duress.[6] Petitioner does not argue that a relevant mitigating factor was omitted or that the law was misstated. We find that these factors are consistent with the judicial construction of the phrase "any mitigating circumstances" contained in § 701.10, Van Woundenberg v. State, 720 P.2d 328, 336 (Okla. Crim. App. 1986), and conclude that petitioner was not prejudiced by counsel's failure to submit instructions on mitigation. Strickland, 466 U.S. at 694.

D. Mitigating Testimony

The critical question in this case

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7. At the time of the murder, the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirement of law was impaired as a result of mental disease or intoxication;

8. The age of the defendant at the time of the crime.

is whether the petitioner was denied a federal constitutional right when the trial court, on its own initiative, precluded the jury from considering Mrs. Dutton's testimony. As discussed below, it is apparent from the record in this case, as well as the context of the proceeding and the nature of the witness, that at least some of Mrs. Dutton's testimony might have been relevant mitigating evidence. The Supreme Court's decision in Skipper v. South Carolina, 106 S.Ct. 1669 (1986) dictates the conclusion that the state trial judge erred by refusing to permit counsel the opportunity to present this evidence to the sentencing jury. As a consequence, the United States District Court erred by denying the writ of habeas corpus. We, therefore, must reverse and remand.[7]

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[7]Although the decision in Skipper was rendered almost seven years after petitioner was tried, we are bound to apply that holding to this case. The

A review of the evolution of the Supreme Court's position on mitigating evidence in death penalty cases is instructive in making our decision in this case. In Woodson v. North Carolina, 428 U.S. 280 (1976), a plurality observed

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same reasons that require the retroactive application of Lockett v. Ohio, 438 U.S. 586 (1978), Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985) (en banc), also call for its application in this case. See generally Hankerson v. North Carolina, 432 U.S. 233, 240-44 (1977); Rose v. Engle, 722 F.2d 1277, 1278-81 (6th Cir. 1983), cert. denied sub nom., Tate v. Rose, 470 U.S. 1003 (1985); Woodard v. Sargent, 753 F.2d 694, 695-97 (8th Cir. 1985).

We are aware that petitioner may not have challenged Mrs. Dutton's exclusion on constitutional grounds on direct appeal. It is clear, however, that it is raised in the application for post-conviction relief and considered by the state district court. Record vol. entitled "Criminal Appeal-Original Record" at 3 and 33. In affirming, the Oklahoma Court of Criminal Appeals found no procedural bar concerning this issue. Record vol. I at 19-20. When a state court considers a federal constitutional claim on the merits, notwithstanding a procedural bypass, the federal habeas court also must determine the issue. Lefkowitz v. Newsome, 420 U.S. 283, 292 n.9 (1975); Westbrook v. Zant, 704 F.2d 1487, 1491 n.6 (11th Cir. 1983).

that the "death penalty is qualitatively different" from any other sentence, id. at 305, and that "'individual culpability is not always measured by the category of the crime committed.'" Id. at 298 (quoting Furman v. Georgia, 408 U.S. 238, 402 (1972))(Burger, C.J., dissenting). The mandatory death penalty statute was held invalid because it did not allow for consideration of the "character and record of the individual offender or the circumstances of the particular offense...." Id. at 304.

In Lockett v. Ohio, 438 U.S. 586, 604 (1978), Chief Justice Burger, writing for a plurality of the Court, ruled that the eighth and fourteenth amendments require that the sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the de-

fendant proffers as a basis for a sentence less than death" (emphasis in original). The Ohio statute, which did not permit the sentencer to consider, as mitigating factors, character, prior record, age, lack of specific intent to cause death, and the degree of involvement in the crime, was found to be constitutionally infirm. The Court recognized the death penalty is qualitatively different from any other sentence, id., and stressed the need for "individualized consideration of mitigating factors" in capital cases. Id. at 606.

A year later, in Green v. Georgia, 442 U.S. 95, 97 (1979)(per curiam), the Court held that testimony, though hearsay under Georgia law, could not be excluded because it was "highly relevant to a critical issue in the punishment phase of the trial ... and substantial reasons existed to assume its reli-

ability." Petitioner had attempted to introduce testimony to the effect that the witness had been told by the co-defendant that he (the co-defendant) had actually killed the victim. The "critical issue" during the penalty phase was whether petitioner had participated directly in the murder. Tying the decision to the unique facts of the case, the Court concluded that "'the hearsay rule may not be applied mechanistically to defeat the ends of justice.'" Id., (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973)).

More recently, in Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court vacated a death sentence relying on the standard set forth in Lockett. Eddings, while sixteen years old, killed a police officer in Oklahoma. During the sentencing proceeding, in mitigation, he presented evidence of a turbulent family

history, of beatings by his father, and of emotional disturbance. The trial judge refused, as a matter of law, to consider in mitigation Eddings' family background and emotional disturbance, and found that the only mitigating circumstance was petitioner's youth, which was outweighed by aggravating circumstances. The Court found Eddings' family background and mental and emotional development relevant mitigating factors that must be considered in sentencing. Id. at 116. It stressed that a system of capital punishment must be "humane and sensible to the uniqueness of the individual, id. at 110, and that the death sentence may not be imposed without individualized consideration of mitigating factors. The Court noted that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither

may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." Id. at 113-14 (emphasis in original).

The most recent pronouncement by the Court on the issue is Skipper v. South Carolina, 106 S.Ct. 1669 (1986). Skipper was convicted in South Carolina of capital murder and rape, and sentenced to death. During the sentencing proceeding, Skipper sought to present testimony of two jailers and a regular visitor to the jail to demonstrate his good behavior during the seven months he was in jail awaiting trial. The trial court, however, precluded the witnesses from testifying, ruling such evidence would be irrelevant because "'whether [petitioner] can adjust or not adjust' was 'not an issue in this case.'" Id. at 1670.

The State argued that the ruling

was correct because the witnesses were not competent to give any opinion of Skipper's future adaptability to prison, that his ability to adjust to prison was irrelevant because it did not bear on his character, and the testimony would have been cumulative because Skipper and his former wife testified about his behavior in jail. The Court rejected these arguments. It observed that Skipper informed the trial court that he intended the witnesses to testify about his past adjustment to prison, not render an opinion about future adaptability. Thus, the witnesses were competent to testify about what they had observed. It also concluded that "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." Id. at

1672. Its final conclusion was that the exclusion of the proffered testimony was not harmless because the testimony of the jailers, though cumulative, would tend to be given greater weight by the jury. The Court's holding was summarized as follows: "The exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of character and record of the individual offender." Id. at 1673.

In this case, Mrs. Dutton's testimony would have been relevant mitigating evidence and its exclusion impeded the jury's ability to consider relevant aspects of petitioner's character. Mrs. Dutton was present in the courtroom, was called by petitioner to testify, and it is apparent from the record that she would have testified about such miti-

gating factors as family background, medical history and education. Record vol. III at 49-68. The trial court could have reasonably inferred the general character of Mrs. Dutton's testimony from the context of the proceeding. Although everything Mrs. Dutton would have said might not have been relevant, and could have been excluded, the nature of the witness and the context of the proceedings would provide a sufficient basis to allow her to testify. It is clear from the testimony given by Mr. Dutton's trial counsel at the habeas corpus proceeding that he intended to call Mrs. Dutton for the purpose of eliciting testimony that would have been relevant to the issue of mitigation. Among other things, he stated Mrs. Dutton would have told the jury that her son was "immature," was a "slow learner," did not "think real well," was

"not very smart," and was a "follower." Record vol. 3 at 133-36. Moreover, during his opening remarks, trial counsel generally informed the court what he intended to show through the testimony of his two witnesses. These remarks sufficiently alerted the trial judge to the nature and tenor of Mrs. Dutton's testimony and that such testimony was likely to be relevant mitigating evidence. Record vol. II at 481-82. Under Skipper, this type of evidence of petitioner's character may not be excluded from the sentencer's consideration.[8]

Oklahoma's rule of sequestration is a valid and important state rule.

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[8]The exclusion of this type of evidence of petitioner's character cannot be considered harmless error because, as in Skipper, we cannot confidently conclude that it would have had no appreciable effect upon the jury's deliberations. Skipper, 106 S.Ct. at 1673. Under the circumstances of this case, it appears reasonably likely that the exclusion of evidence bearing on petitioner's character may have affected the jury's decision to impose the death sentence. Id.

Nevertheless, a trial judge, faced with noncompliance with an order of sequestration, has a variety of methods of responding. 3 J. Weinstein and M. Berger, Weinstein's Evidence ¶ 615[03]. The Oklahoma courts have ruled that "it is within the discretion of the court to allow or exclude the testimony of such a witness." Mayes v. State, 560 P.2d 574, 577 (Okla. Crim. App. 1976); Edwards v. State, 655 P.2d 1048, 1051-52 (Okla. Crim. App. 1982). In the sentencing phase of a death penalty case, evidentiary rules "may not be applied mechanistically ...." Green v. Georgia, 442 U.S. at 97. Assuming the exclusion order properly applied to the sentencing proceeding, the trial court had the discretion to select means other than the exclusion of Mrs. Dutton's testimony to enforce the sequestration order. For example, it could have allowed Mrs.

Dutton to testify, and then instructed the jury that she was present during the guilt proceeding. That approach would have permitted the jury to assess the witness's credibility while, at the same time, allowed petitioner to present crucial mitigating evidence.

In Cobb v. State, 260 S.E.2d 60 (Ga. 1979), the Georgia Supreme Court was confronted with this issue under very similar circumstances. The Georgia court ruled that, although the defendant failed to make an offer of proof, the trial court erred in mechanically applying the sequestration order to exclude a mitigating witness during the sentencing phase of a death penalty trial. Other courts have come to the same conclusion. For example, the Florida Supreme Court, in Wright v. State, 473 So.2d 1277, 1280 (Fla. 1985), cert. denied, 106 S.Ct. 870 (1986), ruled that the trial judge erred

in strictly enforcing a sequestration order in a death penalty case. The Alabama Supreme Court, in Ex parte Faircloth, 471 So. 2d 493, 496 (Ala. 1985), held that "an accused may not be deprived of a witness's testimony solely because a witness disobeyed a sequestration order when that deprivation would violate the accused's constitutional rights." And in Allen v. State, 641 S.W.2d 710, 712 (Ark. 1982), the Arkansas court noted that a violation of a sequestration order concerns credibility, not competency, and held that the "rule" should not be applied to deny an accused his constitutional rights even in the absence of a proffer. The Fifth Circuit, in Broswell v. Wainwright, 463 F.2d 1148 (5th Cir. 1972), also ruled that a breach of rule of sequestration cannot be used to deny a criminal defendant his constitutional right to present witnesses in his favor.

We agree with the holdings in these cases. In light of the critical nature of mitigating evidence in a death penalty case, the fact that there were no objections to the testimony, and the trial court's discretion to permit the witness to testify, we conclude the state trial court erred by exlcuding relevant mitigating testimony.

III.

There is no more painful or sobering task for a judge than to pass on a capital case. Although we have been concerned throughout this discussion with the rights of petitioner, we are mindful of the death and suffering he has caused. While the record reflects that petitioner murdered in cold blood, we are obliged to follow certain established rules that govern the imposition of capital punishment. The Supreme Court has been exceedingly cautious to

ensure that a person found guilty of a capital offense is given every opportunity to present potentially mitigating evidence that might form the basis for a sentence less than death. As a lower federal appellate court, we are bound by the Court's pronouncement that a sentencer may not be precluded from considering any relevant mitigating evidence. Thus, although petitioner's first degree murder conviction is valid, because the sentencing jury was prevented from considering the testimony of petitioner's mother during the sentencing proceeding, the death sentence imposed on petitioner must be adjudged invalid under the eighth and fourteenth amendments.

The judgment of the district court denying the petition for a writ of habeas corpus is reversed. The district court is directed to issue a writ of habeas corpus, modifying petitioner's

sentence to life imprisonment[9] unless the State, within such reasonable time as the district court may fix, commences new sentencing proceedings to relitigate the issue of punishment.[10]

REVERSED AND REMANDED.

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[9]28 U.S.C. § 2243 empowers the court, in granting the writ, to "dispose of the matter as law and justice require." Fay v. Noia, 372 U.S. 391, 438 (1963) (dictum).

[10]Okla. Stat. Ann. tit. 21, § 701.13 (West Supp. 1987) appears to permit death penalty cases to be remanded for resentencing. We are aware that the Oklahoma courts have expressed reservations about the application of this statute to cases pending on appeal at the time of its passage. Green v. State, 713 P.2d 1032, 1041 n.4 (Okla. Crim. App. 1985); but see, Brewer v. State, 718 P. 2d 354, 365-66 n.1 (Okla. Crim. App.), cert. denied, 107 S.Ct. 245 (1986). That matter is not now before us and we express no view on whether it would violate the United States Constitution to apply the statute retroactively.

No. 85-2115 - DUTTON V. BROWN

BARRETT, Circuit Judge, concurring:

I fully concur in Judge Baldock's en banc opinion. I write separately to emphasize one point.

The fact that proffered mitigating testimony is relevant does not, standing alone, render its exclusion reversible error. In Skipper v. South Carolina, ___ U.S. ____, 106 S.Ct. 1669, No. 84-6859 (1986), the reason that the trial court's exclusion of the proffered testimony of the two jailers was held to be reversible error was pinpointed in the majority opinion:

> Nor can we confidently conclude that credible evidence that petitioner was a good prison would have had no effect upon the jury's deliberations. The prosecutor himself, in closing argument, made much of the dangers petitioner would pose if sentenced to prison, and went so far as to assert that petitioner could be expected to rape other inmates. Under these circumstances, it appears reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in

> jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence. Thus, under any standard, the exclusion of the evidence was sufficiently prejudicial to constitute reversible error.

Slip opinion, No. 84-6859, p. 7.

In the instant case, the main factor in mitigation was the contention that Dutton was easily influenced by older men. In relation to the murder, Dutton's contention was that he was so much under the influence and control of one Carl Morgan that he (Dutton) shot and killed Gray because he had been commanded to do so by Morgan. Mrs. Dutton would have testified, among other things, that: her son was a slow learner; as a boy he was well behaved, but always scared, easily intimidated and always in fear of his peers; he was easily influenced by older men; and he had been committed to hospitals on several occasions for treatment of emo-

tional problems, precipitated by drug abuse. This testimony would have been quite important in relation to the contention that Dutton acted out of fear and under the influence of Morgan.

Thus, while some of Mrs. Dutton's testimony concerning her son's character and background, though relevant, would not have risen to the level of prejudicial error if excluded, her testimony concerning her son's emotional problems and his history of having been easily influence, led and intimidated by his peers was central to his mitigation defense. As such, its exclusion was not harmless error. Skipper, supra; Chapman v. California, 386 U.S. 18 (1967).

No. 85-2115 - LONNIE JOE DUTTON v. JOHN N. BROWN

MOORE, J., Circuit Judge, concurring:

I am in agreement with the results reached in this case and with the general analysis undertaken by the court, but because I believe the court has not fully emphasized the precise problem presented here, I feel obliged to write separately.

In this case, the record makes clear that but for the unsolicited application of a rule of sequestration, the sentencing jury would have heard critical mitigating evidence. Moreover, it is also clear that this rule was invoked needlessly and without consideration of the nature of the testimony that would have been presented. Under Oklahoma law, "it is within the discretion of the court to allow or exclude the testimony of . . . a witness [whose testimony

would otherwise violate a sequestration rule]." Mayes v. State, 560 P.2d 574, 577 (Okla. Crim. App. 1976); Edwards v. State, 655 P.2d 1048, 1051-52 (Okla. Crim. App. 1982). Nevertheless, the state trial court made no effort to exercise this discretion, despite the knowledge that Mrs. Dutton was a vital witness.

Defense counsel's opening remarks informed the court of what he intended to show through the testimony of his witnesses. These remarks alerted the judge to the nature of Mrs. Dutton's testimony, leaving no doubt that she would present relevant mitigating evidence. That conclusion is amplified by the testimony of Mr. Dutton's trial counsel at the habeas hearing in the district court. As in Skipper, exclusion of this evidence of petitioner's character improperly deprived him of his

right to introduce relevant evidence bearing upon the sentencer's consideration.[1]

These circumstances compel the conclusion that the application of the Oklahoma rule on sequestration of witnesses to exclude the testimony of the only witness known to the court to be available to give mitigating evidence in his behalf deprived Mr. Dutton of a fair trial.[2] Even though the Oklahoma rule

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[1]Given this jury deliberated over six hours with only the state's strong aggravating evidence and minimal defense evidence before them, this is no idle concern.

[2]To the extent the majority opinion can be read to imply that simply because Mrs. Dutton was the defendant's mother the trial judge should have assumed her testimony would have been relevant, I disagree. It is because the trial judge was <u>told</u> what the defense witnesses were going to say, not because of whom they were, that error was committed. With the knowledge of this testimony, the judge had sufficient information before him to exercise his discretion to allow Mrs. Dutton to testify. His failure to do so under these circumstances is constitutional error.

is valid and important, its application to this case worked a result which was beyond the underlying purpose of the rule itself. Since the state judge was imbued with discretion to allow Mrs. Dutton to testify, even if her testimony was in violation of the rule, application of the rule in this case was mechanistic and constitutionally unsupportable. See Green v. Georgia, 442 U.S. at 97. The action of the state trial judge here was no different in substance from the acts of the trial judge in Skipper; thus, we have no choice but to conclude the writ of habeas corpus must be granted. Judge Anderson joins me in this concurrence.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

LONNIE JOE DUTTON,	)	
	)	
Petitioner,	)	
	)	
v.	)	NO. CIV-85-16
	)	
JOHN N. BROWN, Warden, Oklahoma State Penitentiary at McAlester, Oklahoma,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
MICHAEL C. TURPEN, Attorney General of the State of Oklahoma,	)	
	)	
Additional Respondent.	)	

[Filed July 12, 1985]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before LUTHER B. EUBANKS,
United States District Judge

FINDINGS OF FACT

1. The petitioner is a death row inmate in the State of Oklahoma prison pursuant to a Judgment and Sentence issued by the District Court of Oklahoma County, Case No. CRF-79-105. The Petitioner was tried on May 7-10, 1979, before the Honorable Harold C. Theus, District Judge, Oklahoma County, and was found guilty of first degree murder by a jury. Thereafter, in a second-stage hearing, the petitioner received the death penalty in accordance with the recommendation of the jury. The petitioner appealed his conviction and on January 6, 1984, the Oklahoma Court of Criminal Appeals affirmed the conviction and sentence of the petitioner. See Dutton v. State, 674 P.2d 1134, cert. denied, 104 S.Ct. 3548; 82 L.Ed.2d 850,

with Justices Brennan and Marshall dissenting on the ground that, in their view, the death penalty is in all circumcumstances, cruel and unusual punishment.

2. The petitioner then filed an Application for Post-Conviction Relief in the District Court of Oklahoma County, which resulted in a denial of same. On February 1, 1985, the Court of Criminal Appeals affirmed the denial of this Post-Conviction Application.

3. The petitioner then filed a second Petition for Certiorari with the United States Supreme Court, and on May 16, 1985, that Court denied same in Case No. 84-6490.

4. On June 26, 1985, the petitioner filed the present Petition for Writ of Habeas Corpus and an evidentiary hearing was held on July 2, 1985.

5. During the last mentioned hearing, the Court heard testimony of four witnesses: J. Malone Brewer, the petitioner's court-appointed attorney at his jury trial; Mrs. Jean Dutton, the mother of the petitioner; Mr. Aubrey Dutton, father of the petitioner; and Mr. Robert A. Ravitz, First Assistant Public Defender in Oklahoma County.

6. The testimony of the witnesses centered upon the alleged ineffectiveness on the part of Mr. J. Malone Brewer, who was appointed by the state district court to represent the petitioner at his trial. The parents of petitioner testified with respect to his misbehavior and drug use.

7. The Court finds that Mr. Brewer is an experienced criminal trial attorney who has practiced law in the State of Oklahoma since 1971. Evidence

revealed that Mr. Brewer has tried approximately sixty criminal jury cases as an assistant public defender, an assistant district attorney, and in private practice.

8. The Court further finds that during the week between the first and second stages of the trial, Mr. Brewer inquired of the petitioner's mother as to whether there was anything in the petitioner's background which could serve as mitigating evidence at his trial, but she offered nothing new. At this time, she was expecting to be a witness during the punishment stage. The Court further finds that during the first stage of the murder trial, petitioner's mother informed Mr. Brewer that her son, the petitioner, had been committed to the Baptist Hospital in Oklahoma City in 1974 for drug abuse and

repeated criminal law violations. The Baptist Hospital is not a psychiatric facility but psychiatrists do serve on the staff and are available on call. As result of this information and for the further reason that the petitioner apparently became shaky and committed some acts of misbehavior during the trial, defense counsel asked for and was granted a 1/2 day delay in the trial in order to have his client examined by a psychiatrist. Defense counsel obtained the services of two practicing and certified psychiatrists in Oklahoma, Dr. Oberonn and Dr. O'Carroll, who examined the petitioner and thereafter reported the results of their examination to defense counsel and to the trial judge. Although the testimony of these doctors is not made a part of the record, it is

apparent from the transcript that they concluded that Dutton did not have any psychiatric overlays; that he was not psychotic; that he was not dillusionary; that he was able to understand and to communicate with them; that he was frightened of the proceedings and frightened of the consequences of his actions and that he was concerned that the jury would indeed levy the death penalty against him. The psychiatrists apparently suggested that if Dutton discovered that he could disrupt court proceedings and prevent a trial by his outbursts, he would continue to do so and that any attempt to treat him with kindness or to coddle him would be an indication to him that he could be disruptive and prevent the proceedings. The

psychiatrists apparently saw no reason to think that additional time would have any effect upon the situation and that if the mistrial was granted as requested by Mr. Brewer, Dutton would return to normal within one hour. In short, the psychiatrists believed that Dutton was able to assist counsel if he would do so. At this time, defense counsel did file a formal motion requesting that the petitioner be committed to Central State Hospital in Norman, Oklahoma, for evaluation but this request was denied by the trial judge who stated that although he saw Dutton was distraught in the courtroom and observed him being shaky at times, there was no indication that petitioner was an insane person or unable to assist counsel.

It should be noted that during a later hearing prior to the sentencing of petitioner, Jean Dutton, petitioner's mother, testified concerning the commitments of her son to the Baptist Hospital and the South Community Hospital (another medical facility that is not a mental institution). She reiterated what she had earlier told Mr. Brewer, that the petitioner was taken to those facilities because of overdosages of drugs and because he kept running away from home and getting into trouble. She stated that each period of hospitalization had been related to either drugs or paint sniffing or similar reasons.

9. I believe that Mr. Brewer made all reasonable and appropriate efforts to represent petitioner at both stages of the trial. As a matter of fact, the witness, Ravitz, admitted he could find

no fault with the defense put up by Mr. Brewer during the first stage of the case. Petitioner claims, however, and Ravitz so testified, that Brewer failed to provide adequate advice and counsel to him during the punishment stage of his trial, but I disagree. Attorney Brewer was prepared to put on the testimony of the mother of petitioner but was prevented from so doing by a ruling of the trial judge holding that since the sequestration of witness rule had been invoked by defendant at the outset of the trial and because she had remained in the courtroom during the first stage of the proceedings, she could not testify during the punishment portion of the trial. While I believe the better rule would have been to allow her to testify during the second-stage hearing,

I agree with Judge Cornish of the Oklahoma Court of Criminal Appeals that the exclusion of this testimony is not grounds for reversal. Furthermore, if error was made, it was made by the trial judge rather than by defense counsel, who, in my opinion, had a right to believe that the mother would be permitted to testify during the second stage of the trial notwithstanding her presence in the courtroom during the first stage. See Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150. First of all, there was no tender made of what her testimony would have been. It should be remembered that she testified prior to the sentencing of her son and testified in this Court but offered nothing at either time that would serve to mitigate the punishment her son was assessed.

10. I believe that the trial judge properly declined to have petitioner committed for mental evaluation because there was just no evidence before him to justify such action. It is true that the defendant had made some outbursts in Court on the day prior to the filing of the Application for Commitment, but the psychiatrists who examined Dutton indicated that his outbursts and his failure to cooperate with defense counsel were the result of fear and recommended that the trial should proceed; otherwise, the Court could expect the continuation of disruptive behavior.

11. I cannot see, under the facts revealed in this record, where the defense lawyer could find any mitigating circumstances sufficient to overcome the aggravating facts to avoid the death penalty. The evidence shows conclusively

that Dutton and confederate Carl Shelton Morgan set out on an extended crime spree beginning January 1, 1979. Dutton borrowed a gun from one K. P. Kelley which gun was originally owned by Dutton but had been sold by him to Kelley for $40. With this single weapon, the two set about to find places to rob. They first robbed the Agnew Bar, where waitress Wilma Speaks was murdered with the gun being fired by Morgan. Dutton took the money from the purse of the murdered bar attendant and also from the Agnew Bar cash register. He later divided the money with Morgan, keeping $70 as his half. The next day the murder of Dale Eugene Gray took place with Dutton doing the killing while Morgan waited in the car outside. After shooting Gray several times, Dutton twice shot and wounded Mrs. Wanda Honeycutt, who was

the mother of Gray and an employee of the Cottage Bar, where the murder occurred. Again the money was taken by Dutton and divided by the two confederates.

On the very next day, January 3, 1979, the two robbed the Sipango Bar on North Western Avenue. During this robbery, Morgan held the gun but Dutton had a knife. While the two employees of the bar were lying on the floor face down, Dutton suggested to Morgan that the two should be killed and during this time Dutton stuck the knife he held into the backs of each of the bar attendants. A customer came into the bar along about this time, which probably saved the lives of the two operators of the Sipango Bar.

Shortly thereafter, Dutton was arrested and has been held in custody since.

After the first murder Dutton saw his confederate, Morgan, reload the gun with hollow-point bullets, which were in it when Dutton murdered Gray.

Practically all of the matters in this finding were fully admitted by Dutton in four separate written confessions and most were corroborated during the trial, including the place where he hid the gun after committing these murders.

CONCLUSIONS OF LAW

The petitioner has exhausted his state remedies with regard to the issues raised in his petition. Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).

2. The trial transcript, the original record, and other documents filed with regard to this case, and the evidence presented at the evidentiary hearing on July 2, 1985, persuade me that the petitioner received reasonably effective assistance of counsel pursuant to the standards set forth by the United States Supreme Court in Strickland v. Washington, 104 S.Ct. 2052, 80 L.Ed.2d 672 (1984), and United States v. Cronic, ___ U.S. ___, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The Court finds that the decisions made by Mr. Brewer with regard to the presentation of mitigating evidence were tactical decisions and there is no showing that any errors that Mr. Brewer made were so serious that counsel was not functioning as required by the Sixth Amendment. Furthermore, the petitioner has failed to meet his burden of

showing that complained of performance by Mr. Brewer prejudiced the defense. Therefore, the petitioner has failed in showing that counsel's performance was deficient or that he was prejudiced thereby, and therefore, the Court holds that it cannot be said that the death sentence resulted from a breakdown in the adversarial process that rendered the result unreliable. Strickland v. Washington, supra.

3. The action of Mr. Brewer with regard to failure to have the mother of the petitioner excluded from the courtroom pursuant to the rule of sequestration, did not deny the petitioner reasonably effective assistance of counsel. The petitioner has failed to carry his burden in showing that, "there was a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceedings would have been different." Strickland v. Washington, supra. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding . . . not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." Strickland v. Washington, supra. Any error by the petitioner's counsel is also not ineffectiveness as defined by "right to counsel" cases decided by the Court of Appeals for the Tenth Circuit subsequent to Strickland and Cronic. See, McGee v. Crist, 739 F.2d 505 (10th Cir. 1984); Valdez v. Winans, 738 F.2d 1087 (10th Cir. 1982); United States v. Geittmann, 733 F.2d 1419 (10th Cir.1984).

4. Even if the mother of the petitioner, had testified, it is the firm belief of this Court that the death sentence would still have been imposed by the jury. In Strickland, the Supreme Court held:

> When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencers - including an appellate court, to the extent that it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death (at P. 2069).

The Court finds that, after having independently reweighed the evidence, that if Mrs. Dutton had testified concerning the petitioner's background and any

other claimed mitigating circumstances, the balance of aggravating-mitigating circumstances still warranted the death penalty. The Court finds that the petitioner has failed to meet his burden in showing that the decision reached would likely have been different absent the claimed errors. Lockett v. Ohio, 438 U.S. 586, relied upon by petitioner, is inapposite because there the Ohio statute prohibited the introduction of some mitigating evidence whereas here there apparently was none available.

6. An attorney for a defendant in a capital case is not always required to call witnesses in mitigation. See, Strickland, supra. The Court finds that the failure of Mr. Brewer to call other witnesses in the second stage did not prejudice the petitioner and would not have changed the result. "If there is

no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." United States v. Cronic, supra. See also, Strickland, supra.

7. The petitioner also contends that Mr. Brewer was ineffective because he introduced into evidence at the second stage a copy of a confession (Defendant's Exhibit No. 1), which the petitioner gave to police. However, perusal of that statement reveals that it covers crimes which had already been confessed to in exhibits which the State had previously introduced into evidence (State's Exhibit No. 16, Tr. 279; State's Exhibit No. 21, Tr. 472). Furthermore, Defendant's Exhibit No. 1 contains certain statements which, if believed, are mitigating and which do not appear in either of the other two exhibits.

8. The petitioner also raises the claim regarding the exclusion of the petitioner's mother by the trial court. The trial court disallowed the testimony of the petitioner's mother because she did not comply with the rule of sequestration, which is embodied in Oklahoma's Evidence Code, 12 O.S. 1981, Section 2615. This provision is similar to Rule 615, Federal Evidence Code. It is the opinion of the Court that the rule of sequestration is a valid state procedural rule and the exclusion of the petitioner's mother pursuant to this rule did not violate any federal rights of the petitioner although the better rule would have been to allow her to testify.

9. Dutton contends that his rights were violated by pretrial publicity and the failure of his attorney to obtain a change of venue. However, a

reading of the voir dire reveals that only three of the prospective jurors had ever heard of the case (Mr. Brewington, Tr. 83; Ms. Sutton, Tr. 125; and Ms. Harder, Tr. 147). Only one of these persons was seated as a juror (Ms. Harder), and she had heard of the case in only the most general terms. Furthermore, Ms. Harder stated that she had formed no conclusion as to guilt or innocence based upon what she heard. Therefore, no federal constitutional rights of the petitioner have been violated in this regard. Dobbert v. Florida, 432 U.S. 282, 301-302, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977); Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). The fact that Dutton's confederate obtained a change of venue to Tulsa (where he also

received the death penalty) does not mandate a finding that Dutton was deprived of this constitutional right to a fair trial because he was not afforded the same treatment.

10. Although I do not believe that Dutton has properly raised the question in his petition herein, I will, none the less, address a contention raised in his Post-Trial Brief that his constitutional right to a fair and impartial jury was violated when the trial court excused prospective juror, Steven Rutherford for cause. Petitioner relies upon the holding in Witherspoon v. Illinois, 391 U.S. 510, as basis for this contention. I disagree and hold that, in my opinion, this juror was properly excused for cause. With respect to this juror, the transcript reflects the following colloquy:

MR. COATS: Our concern is sometimes that people, realizing the penalties, have difficulty separating those things out and concerning themselves with the question of guilt. And, at the first time, for everybody's sake, we would ask you that you would be able to consider only the question of whether this man is guilty of these acts charged beyond a reasonable doubt. Can you do that?

(Some prospective jurors nodded heads up-and-down).

MR. RUTHERFORD: I don't believe I could. I don't believe I could get that off my mind, no.

MR. COATS: All right, sir. Thank you. What you're saying is that the fact that the punishment would weigh so heavily on your mind that you might not be able to give them a fair trial as far as guilt is concerned?

> MR. RUTHERFORD: I think that's a strong possibility.
>
> MR. COATS: Well, in that event, I think we'd have to ask that Mr. Rutherford be excused, your Honor.
>
> MR. BREWER: Note my objection, if the Court pleases.
>
> THE COURT: Challenge will be sustained. Mr. Rutherford, you may sit aside. Note the Defendant's exception's to the Court's ruling.

Transcript, p. 53, lines 15-25; & p. 54, lines 1-10.

After the foregoing had been written in final form, I received and examined copies of the petitioner's medical records from Baptist Hospital in Oklahoma City and South Community Hospital in Oklahoma City. The Baptist Hospital medical records reflect that Dutton was admitted on October 1, 1975 under primary diagnosis of antisocial personality.

Some of the notations made by Baptist Hospital physicians and hospital staff concerning Dutton's behavior are noted below:

DATE	COMMENT NOTED
10-01-75	Admitted to Baptist Hospital for evaluation prior to court hearing. Dr. Jim H. Earls, M.D. noted "long standing history of behavior disorders..."
10-02-75	R.N. V. Billings noted at one time during the evening Dutton "was barking like a dog".
10-04-75	Dr. Bieal noted patient "depressed, withdrawn, suspicious and confused".
10-06-75	Staff notes described Dutton "impulsive, hyperactive and overtalkative".
10-08-75	Anxious, expresses concern about body harm resulting from speed & alcohol. Cooperative but still unable to comprehend possible self-punishment drive.
10-18-75	R.N. Billings notes "Manipulative, complains of ankle pain but up about constantly. Actions & what he says are contradictory".

10-26-75 Seems to be a little disorganized in his thinking.

10-29-75 Neurotic Character Disorder (noted on Extended Stay Certification signed by J. Earl, M.D. as criteria for continued hospitalization).

11-05-75 Neurotic Character Disorder (noted on Extended Stay Certification signed by J. Earl, M.D. as criteria for continued hospitalization).

11-11-75 Neurotic Character Disorder (noted on Extended Stay Certification signed by J. Earl, M.D. as criteria for continued hospitalization). - Discharged from hospital 11-12-75.

I find no indication in the Baptist Hospital records that Dutton is mentally ill and there is no recommendation for confinement or additional psychiatric treatment.

The medical records from South Community Hospital reflect that Dutton was admitted there on more than one occasion, but the reason for those admissions

were varied, e.g., drug overdosages, accidents, infectious hepatitus, etc. The South Community Hospital records are completely void of any indication of mental illness or disorder. The Court, however, does note the following "patient history" statement signed by Dalton McInnis, Attending Physician, on June 15, 1976:

> PH: The patient has been seen on some occasions because of irrational behaviour and accidents. He was previously hospitalized at this institution with slight overdose of medication and was placed under psychiatric care.

C O N C L U S I O N

While I find no difficulty in denying the instant Writ and opine that the Court and the jury were fully justified in meting out the maximum punishment of

death herein, I do believe it is my duty under Coleman v. Brown, 753 F.2d 832 (10th Cir. 1985) to stay the execution of petitioner which is now set for July 22, 1985, and accordingly, I do so. In Coleman, our controlling Circuit, speaking through Chief Judge Holloway, held that where necessary to prevent the case from becoming moot by the petitioner's execution, a stay should be granted pending disposition of an appeal. Therein, the Court further held: "The Supreme Court has emphasized the duty of the courts of appeal to afford the parties an opportunity to address the underlying merits," (of habeas petitions where the death penalty is involved). Accordingly, to save our overworked Circuit Judges, the burden of hasty assembly to grant a stay of petitioner's execution,

I do so myself, but the stay herein granted shall extend only for a period of twenty (20) days from this date and will thereupon terminate unless in the interim petitioner has perfected an appeal from this order. In the event petitioner does perfect such appeal within said period of time, then the stay herein granted shall thereafter continue in full force and effect pending further order of the Court of Appeals for the Tenth Circuit.

For the reasons stated, IT IS THE ORDER OF THIS COURT THAT PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS BE AND IS HEREBY DISMISSED BUT STAY OF PETITIONER'S EXECUTION IS TEMPORARILY GRANTED AND CERTIFICATE OF PROBABLE CAUSE WILL BE ISSUED UPON PROPER AND TIMELY REQUEST THEREFOR.

The Clerk of the Court is instructed to mail copies to all counsel of record and the Warden at the Oklahoma State Penitentiary at McAlester, Oklahoma.

DATED THIS 12th day of July, 1985.

/s/ Luther B. Eubanks

Luther B. Eubanks

UNITED STATES DISTRICTJUDGE

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LONNIE JOE DUTTON,	)	
	)	
Petitioner,	)	
	)	
-vs-	)	No. PC-84-665
	)	
STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

ORDER AFFIRMING DENIAL OF POST CONVICTION RELIEF

[filed February 8, 1985]

The petitioner has appealed to this Court from an order of the District Court of Oklahoma County denying his application for post-conviction relief in Case No. CRF-79-105, wherein the Honorable William Saied entered findings of fact and conclusions of law regarding each allegation of error raised by petitioner in his application for post-conviction relief, and denied same.

The petitioner was convicted of Murder in the First Degree and received the death penalty. He subsequently appealed, and this Court affirmed that conviction in Dutton v. State, 674 P.2d 1134 (Okl.Cr. 1984).

As an allegation of error, the petitioner claims that the trial court abused his discretion in denying him an evidentiary hearing regarding his application for post-conviction relief.

It is clear that an evidentiary hearing is necessary when there exists a material issue of fact that is needed to adequately address the application for post-conviction relief.

Title 22 O.S. 1981, § 1084 provides:

> If the application cannot be disposed of on the pleadings and record or there exists a material issue of fact, the court shall conduct an evidentiary hearing at which time a record shall be made and preserved. The court may receive proof by affidavits, depositions, oral testimony, or other evidence and may order the appli-

> cant brought before it for the hearing. A judge should not preside at such a hearing if his testimony is material. The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. This order is a final judgment.

It is apparent that the petitioner raised no new issues that would require an evidentiary hearing at the trial level. Therefore, we find the denial of the evidentiary hearing was proper.

The petitioner asserts that he received ineffective assistance of counsel at trial, and therefore should have been granted an evidentiary hearing on those allegations. However, it is clear that this Court considered the entire record on appeal, and failed to find merit in petitioner's argument. The doctrine of res judicata in post-conviction proceedings bars consideration of issues which have been or could have been raised on appeal. See Harrell

v. State, 493 P.2d 461 (Okl.Cr. 1972), the cases cited therein, and also the Order in Coleman v. State, _____ P.2d _____, O.B.J. 2528 (Okl.Cr. November, 1984).

We have also viewed this allegation of error in light of Strickland v. Washington, _____ U.S. _____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and find it to be without merit.

Having determined that all the errors raised by the petitioner are barred from consideration by the doctrine of res judicata, and further finding that consideration of the issues do not reveal the necessary denial of effective asistance of counsel to merit reversal or modification of the judgment and sentence, this Court finds the denial of post-conviction relief was proper, and should be, and hereby is, AFFIRMED.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF HIS COURT this 8th day of February, 1985.

s/Ed Parks

ED PARKS, Presiding Judge

s/Tom Brett

TOM BRETT, Judge

s/Hez J. Bussey

HEZ BUSSEY, Judge, CONCUR IN RESULTS

TTEST:

/James Patterson

lerk

APPENDIX D

[Application for Post-conviction Relief In State District Court]

FINDINGS OF FACT and CONCLUSIONS OF LAW

Petitioner, Lonnie Joe Dutton, was tried before a Jury for the crime of Murder In The First Degree. District Judge Harold C. Theus, presiding. On May 10, 1979, he was convicted and sentenced pursuant to the Jury's verdict. He appealed to the Court of Criminal Appeals and said sentence was affirmed on January 6, 1984, Case No. F-79-337.

Dutton vs. State, 674 P2 1134 (Okla Cr 1984)

In this, his Application for Post-Conviction Relief, he alleges nine (9) grounds for relief.

Grounds 1 and 7: He alleges ineffective counsel. This was presented in his appeal and the Appeals Court found

he had effective counsel. (Dutton, supra,p. 1139).

Grounds 3 and 4: He alleges improper selection of jurors and exclusion of jurors due to conscientious scruples. This was presented in his appeal and the Appeals Court found that jury selection was proper under Witherspoon vs. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L.Ed 2nd 776 (1968) (Dutton, supra, p. 1138

Ground 5: Petitioner alleges that death by lethal injection violates the Eighth and Fourteeneth Amendments of the United States Constitution.

The Court of Criminal Appeals has ruled that the death penalty statutes under which Petitioner was tried and convicted was constitutional.

In Boutwell vs. State, 659 P2 322 (Okla. Cr. 1983), page 328, the Court held that the Oklahoma death penalty

statutes complied with the mandates of the Supreme Court in Gregg vs. Georgia, 428 U.S. 153,98 S. Ct. 2909, 49 L.Ed 2nd 859, (1976); and Proffitt vs. Florida, 428 U.S. 242, 98 S. Ct. 2960, 49 L.Ed. 913 (1976).

In Jones vs. State, 660 P2 634 (Okla. 1983) the Appeals Court upheld the constitutionality of the death penalty. (p. 643).

Petitioner was tried under the same death penalty statutes referred to above.

It should be noted that the conviction: Summary of Facts, signed by the trial Judge reads "Death in manner provided by law on July 27, 1979." And the Death Warrant provides "and legally put to death the said defendant, Lonnie Joe Dutton, by continous, intravenous administration of a lethal quanity [sic] of an ultra-shortacting barbiturate in combination with a chemical paralytic agent until death is pronounced by a

licensed physician according to accepted standards of medical practice, or in any manner that may be designated by the laws of the State of Oklahoma, in the manner prescribed by law. (emphasis added).

Ground 9: He alleges improper closing argument by the prosecutor. The Appeals Court in Dutton, supra, stated at page 1140: "In a capital case, the Court will carefully review the record and consider all matters presented which are supported by the record." Petitioner alleges that he separately briefed and argued this before the Court of Criminal Appeals and that said Court did not discuss it as a separate allegation of error. As stated above the matter was considered and the Court concluded that the record revealed no improper comments by the prosecutor.

Grounds 2,6,8: Petitioner alleges he was deprived of his legal rights under

the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because his Mother was not permitted to testify.

This matter was addressed in Dutton, supra, page 1140 and no error was found. However, since the Court stated it was unable to ascertain what testimony in mitigation she would have presented, and since the Petitioner does state in his application some of the matters she would testify, it is necessary that we address this allegation.

Basically, his Mother would have testified that during his adolescence he was a well-behaved young man, perpetually scared, easily intimidated, feared his peers, and had never been imprisoned. He states she would, also, present testimony dealing with sympathy.

He alleges nothing any different from what most Mothers would do to help a son facing the death penalty.

It is not unusual to be scared when you are on trial for your life. In fact, it would be unusual not to be scared. Many young people are easily intimidated by their peers. That is a part of growing up. If these were matters that would excuse the crime of Murder, or any other crime for that matter, we would have no need for prisons. A person could kill at will then claim they should be excused from punishment because background.

Legions of people from poor, underprivileged, broken homes, low economic backgrounds, or who have had problems with their peers, have risen above their surroundings to become respected, hard-working laborers, teachers, doctors, lawyers, Judges, and even Presidents of the United States. By far, the vast majority of young people from underpriviledged [sic] backgrounds have risen

bove their backgrounds to become well espected, productive citizens. Unfor- unately, the Court system sees only hose who did not. The good should not e punished by rewarding the bad.

The testimony of the Mother could ot excuse the Petitioner from the rime which a jury of citizens- his eers- found him guilty.

This case differs from Eddings vs. klahoma, 455 U.S. 104 (1982) and ddings vs. State, 55 O.B.J. 1653 (July 0, 1984). Eddings was sixteen (16) ears old. Petitioner was an adult wenty (20) year of age.

It Is Ordered that Application for ost-Conviction Relief be Denied.

s/William R. Saied

WILLIAM R. SAIED, DISTRICT JUDGE

APPENDIX E

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LONNIE JOE DUTTON	)	
	)	
Appellant,	)	
	)	
vs.	)	No. F-79-337
	)	
STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

[Filed January 6, 1984]
[Rehearing Denied January 31, 1984]

OPINION

CORNISH, Judge:

Lonnie Joe Dutton was convicted by a jury of Murder in the First Degree in the District Court of Oklahoma County. The death penalty was imposed.

Dale Eugene Gray, the deceased, was gunned down after being robbed on January 2, 1979, while working in the Cottage Bar in Oklahoma City. His mother, Wanda Honeycutt, was also shot, but recovered and testified at appellant's

trial, identifying Dutton. On January 5, and January 11, 1979, appellant admitted to police officers that he shot both victims while his confederate, Carl Sheldon Morgan, waited in the car. He also gave written statements concerning his involvement in another robbery-murder of one Wilma Speaks on January 1, 1979 at the Agnew Bar in Oklahoma City, Oklahoma.

Appellant first assigns as error the trial court's failure to grant his pre-trial motion for chage of venue. Appellant's confederate, Carl Sheldon Morgan, was granted a change of venue and was tried in Tulsa County. Dutton argues that the publicity was equally damaging for both, and that his motion should have been granted.

We first point out that appellant failed to follow the procedure prescribed by 22 O.S.1971, § 561 in pre-

senting his change of venue motion to the trial court. A written and verified petition is not contained in the record, nor were affidavits of credible witnesses submitted. The petition, not being properly before the trial court, is not properly before the appellate Court. Ake v. State, 663 P.2d 1 (Okl. Cr. 1983).

Appellant had the burden to demonstrate that he could not get a fair trial in Oklahoma County. He provided no evidence to prove this, but rather relies on the fact that Carl Sheldon Morgan was granted a change of venue supposedly on the basis of adverse pre-trial publicity. Appellant has failed to overcome the presumption that he was able to receive a fair trial. Hammons v. State, 560 P.2d 1024 (Okl.Cr. 1977). The mere showing of adverse pre-trial publicity will not overcome this pre-

sumption especially where an extensive voir dire was allowed, as was done here, to ferret out those juror's who were unable to render a verdict solely upon the evidence presented at trial. Russell v. State, 528 P.2d 336 (Okl.Cr. 1974). That a change of venue was granted to his accomplice does not necessarily dictate that a change of venue be granted appellant. See State ex rel. Young v. Warren, 536 P.2d 965 (Okl.Cr. 1975). The trial judge did not abuse his discretion in denying appellant's motion.

Appellant next assigns as error the trial court's refusal to conduct a competency hearing prior to trial. His attorney states that Dutton made an outburst at trial and refused to assist counsel in his own defense.

Appellant was tried in May of 1979. The controlling statute at that time was

22 O.S.1971, § 1162 (now 22 O.S.1981, § 1162). It required that a jury be impaneled to determine a criminal defendant's competency to stand trial or to be sentenced when "a doubt arises" as to defendant's present sanity. The doubt referred to in the statute is that in the trial judge's mind after an evaluation of the facts, source of information, and motive. The trial judge's finding is not disturbed on appeal absent a showing of clear abuse of discretion. Beck v. State, 626 P.2d 327, 328 (Okl.Cr. 1981).

In the present case, the trial judge made a determination that appellant was competent to stand trial based upon his own observations as well as the opinions of two psychiatrists who examined appellant at his attorney's request on the second day of trial. They reported that appellant was simply

"scared stiff". Appellant's lack of cooperation with his attorney was due to his fear of the possible consequences if found guilty, as opposed to an inability to appreciate the proceedings. The trial court had ample opportunity to observe appellant's conduct during the trial and prior to sentencing. Reynolds v. State, 575 P.2d 628 (Okl.Cr. 1978). We find that no abuse of discretion occurred.

Appellant next contends that two prospective jurors were improperly dismissed for cause under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). The veniremen tended to hedge when answering questions by the prosecutor and judge, but ultimately indicated that their views regarding capital punishment would prevent or substantially impair performance of their duties as jurors. Juror Ruther-

ford, when asked if he could decide the issue of guilt without considering the potential penalties, remarked: "I don't believe I could. I don't believe I could get that off my mind, no." A juror who cannot impartially decide guilt violates his oath, and this is a proper challenge for cause under the directives of Witherspoon. Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). Juror Hopcus remarked, when asked whether she could ever vote to impose the death penalty, "I don't think I could." This juror indicated by her several answers that she was irrevocably committed prior to trial to vote against the death penalty. This is also proper cause to excuse a juror under Witherspoon, 391 U.S. at 522, n. 21, 88 S.Ct. at 1777, 20 L.Ed. at 785, see also Jones v. State, 660 P.2d 638 (Okl.Cr. 1983).

Appellant assigns as error the admission into evidence of his statements to police officers after he was arrested on January 5, 1979, but prior to his arraignment on January 11, 1979. Appellant urges that the delay in arraigning him was unnecessary and infringed upon his constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution, rendering his statements involuntary.

The right to come before a magistrate without unnecessary delay is a statutory (22 O.S.1981, § 181), not a federal constitutional right. Delaney v. Gladden, 397 F.2d 17 (9th Cir. 1968), cert. den , 393 U.S. 1040, 89 D.Ct. 660, 21 L.Ed.2d 585; Stidham v. State, 507 P.2d 1312 (Okl.Cr. 1973). The burden is upon the appellant to demonstrate a delay, and that he was prejudiced by such delay. E.g., Stidham, supra.

> [T]his court has never held that taking a statement or confession of an accused person prior to his arraignment will per se vitiate such statement or confession nor render it inadmissible upon a subsequent trial of the accused.

In re Dare, 370 P.2d 846, 854 (Okl.Cr. 1962). In Dare, a delay of thirty-three days did not of itself cause prejudice.

Each of appellant's statements were introduced only after the trial judge conducted a Jackson v. Denno* hearing and found them voluntary. The jury was instructed that they should not consider this evidence unless they found it to be voluntarily given. Upon a review of the record, we are satisfied that the delay in arraigning appellant did not coerce the admissions.

Appellant next asserts that the trial court, prosecutor, and his own counsel made unconstitutional comments

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*378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 2d 908

on his refusal to testify. During trial, appellant was not responsive to his appointed counsel unlike prior to trial. Appellant was examined by two psychiatrists and found to be "scared", but competent to stand trial. These doctors advised the trial judge that delaying appellant's trial would only worsen this condition. The trial proceeded, and defense counsel announced during opening statement that appellant would testify. The defense theory was that appellant committed the crimes under duress from his accomplice. Appellant did not respond when called by his attorney to testify. The trial judge immediately called the attorneys and appellant into chambers and there advised appellant of his right to testify or to not testify. He advised appellant that he could be cross-examined about prior felony convictions

if he did take the witness stand. The appellant would not respond to the judge. Court was again called into session and defense counsel again called appellant to testify. Appellant did not respond to his attorney's calls and the defense rested, having no further evidence. The trial judge twice ordered the record to show that the "Defendant sits silent" and declines to testify, and once stated that the defense rested, "there being no evidence presented to the jury." During closing arguments, defense counsel remarked that his client was "physically unable" to testify. The prosecutor objected that there was no evidence of that nature, and the judge sustained the objection.

From a review of the record, it is apparent that any error which may have occurred was invited by defendant and his trial counsel. We have previously

held that a defendant may not complain of error he has invited, and that reversal cannot be predicated upon such error. Fox v. State, 524 P.2d 60 (Okl. Cr. 1974). See also Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 1954, 57 L.Ed.2d 973 (1978).

The judge's remarks were made simply to clarify for the record what had occurred. Moreover, the objection by the prosecution and the trial judge's ruling did not constitute a comment upon appellant's refusal to testify. Wills v. State, 636 P.2d 372 (Okl.Cr. 1981).

Appellant implies that he received ineffective assistance of counsel in this regard. A criminal defendant should receive reasonably competent assistance of counsel. Johnson v. State, 620 P.2d 1311 (Okl.Cr. 1980). However, this does not mandate flawless counsel or counsel judged ineffective by

hindsight. Clark v. Blackburn, 619 F.2d 431 (5th Cir. 1980). See also Johnson, 620 P.2d at 1313. We should not now second guess defense counsel's trial strategy. Id. We are unable to conclude upon a review of the record that the level of competency fell below the standard required by the law, especially in light of appellant's conduct, which contributed to the alleged error.

As appellant's sixth allegation of error, he asserts that the trial court erred in admitting several photographs of the deceased on the floor of the bar. The pictures depicted the gun shot wound to the head, as well as the position of the body in relation to the room. Appellant complains that the photographs were not accurate since the body, which originally lay face down, had been turned upright, and that they served no other purpose than to inflame the passions of the jury.

We disagree. The jury was made aware that the body had been moved. Furthermore, the photographs were not unduly gruesome and helped the jury to visualize the crime scene, and tended to corroborate the pathologist's testimony of the cause of death. Thus, we find its probative value outweighed any prejudicial effect. Boutwell v. State, 659 P.2d 322 (Okl.Cr. 1983).

Appellant next assigns as error the trial court's failure to instruct the jury, sua sponte, that they could draw no adverse inferences from appellant's refusal to testify. Appellant's authority for such an assignment, Carter v. Kentucky, 450 U.S. 288, 305, 101 S.Ct. 1112, 1121, 67 L.Ed.2d 241, 254 (1981), provides:

> The failure to limit the jurors' speculation on the meaning of that silence, when the defendant makes a timely request that a prophylactic instruction be given, exacts an impermissible toll on the full and free

> exercise of the privilege. Accordingly, we hold that a state trial judge has the constitutional obligation, upon proper request, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify. (Emphasis added.)

The obligation to so instruct does not arise until a proper request is made. We reject appellant's assertion that a trial judge is obligated to give a cautionary instruction on its own initiative. See also Cole v. State, 645 P.2d 1025 (Okl.Cr. 1982).

Appellant further complains, citing Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), that the court's instruction on Murder in the First Degree improperly shifted the burden of proof to appellant to prove that he did not have a deliberate intention to effect the homicide. The portion appellant finds offensive provides: "It will be sufficient proof of such

deliberate intention if the circumstances attending the homicide and the conduct of the accused convince you beyond a reasonable doubt of the existence of such deliberate intention at the time of the homicide." Sandstrom concerns only presumptions concerning an element of the crime which are mandatory, or shifts the burden to defendant to disprove the element. Id. at 524, 99 S.Ct. at 2459, 61 L.Ed.2d at 51. The portion of the instruction which appellant complains of is neither. Rather, it instructs the jury that they may discern a deliberate intent from circumstantial evidence. This was proper under Oklahoma law. McFarland v. State, 648 P.2d 1248 (Okl.Cr. 1982).

This Court has previously held that in certain instances it is proper for the trial judge to instruct the jury that it should view identification testimony with caution. Melot v. State,

375 P.2d 343 (Okl.Cr. 1962). Appellant contends that the trial court erred in failing to so instruct his jury. However, he failed to request such an instruction, and thereby waived any error in this regard. Luckey v. State, 529 P.2d 994 (Okl.Cr. 1974).

In a capital case, this Court will carefully review the record and consider all matters presented which are supported by the record. Hathcox v. State, 94 Okl.Cr. 110, 230 P.2d 927 (1951); Parish v. State, 77 Okl.Cr. 436, 142 P.2d 642 (1943). Appellant requested at the beginning of the trial that all witnesses be sequestered. See 12 O.S.1981, § 2615. Appellant's mother remained in the courtroom during all of the proceedings. Defense counsel attempted to call her as a witness during the sentencing stage, but, the trial judge refused to permit her to testify.

Appellant asserts that this was an abuse of discretion.

We are unable to discern from the record what testimony in mitigation appellant's mother would have presented. The exclusion of evidence is not ground for error unless a party makes a record of the proposed evidence or the propsed evidence is obvious from the context. 12 O.S.1981, § 2104(A)(2). Appellant's mother and father testified prior to formal sentencing that appellant had been committed to hospitals on several occasions for treatment of his emotional problems. Each occasion had been precipitated by drug abuse, according to her statements. Assuming that this is the same evidence the mother would have given in mitigation, there was no harm resulting to appellant. There was no claimed defense of insanity or drug intoxication. The hospitalization she

described occurred four or five years prior to the alleged crime. This evidence was inconsequential to the defense of duress.

As appellant's final assignment of error, he asserts that he should have received a preliminary hearing on the aggravating circumstances the State intended to prove. We have previously denied such a requirement, and do likewise here. See Stafford v. State, 665 P.2d 1205 (Okl.Cr. 1983); Johnson v. State, 665 P.2d 815 (Okl.Cr. 1983); and, Brewer v. State, 650 P.2d 54 (Okl.Cr. 1982).

On review of the record, we find that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor. 21 O.S.1981, § 701.13(C)(1). We also find that the evidence supports the jury's finding that two aggravating

circumstances existed: that the appellant knowingly created a great risk of death to more than one person; and, that there existed a probability that the appellant would commit criminal acts of violence that would constitute a continuing threat to society. 21 O.S.1981, § 701.12(2) & (7).

By appellant's statements to police officers, he participated in a murder in addition to the killing of the decedent herein, and the shooting of the decedent's mother. His statements also reflect that he was the one who borrowed the gun for the purpose of committing robberies. His claim that he acted out of fear of his accomplice are contradicted by statements in his vonfession that he never tried to get away from Morgan. Rather, he continued his course of crime, and even performed the task of dividing the loot. There was testimony

from Joseph James Seija, another robbery victim of appellant and his accomplice, Morgan, that appellant told Morgan that they should kill their victims. Morgan refused this suggestion. This record sufficiently supports the jury's findings.

We further find that the sentence is not excessive nor disproportionate compared with the penalty imposed in similar cases, considering both the crime and the defendant. 21 O.S.1981, § 701.13(C)(3). Comparison has been made with several prior decisions in which the death sentence was affirmed. Coleman v. State, 668 P.2d 1126 (Okl.Cr. 1983); Stafford v. State, 665 P.2d 1205 (Okl.Cr. 1983); Ake v. State, 663 P.2d 1 (Okl.Cr. 1983); Smith v. State, 659 P.2d 330 (Okl.Cr. 1983); Parks v. State, 651 P.2d 686 (Okl.Cr. 1982); Jones v. State, 648 P.2d 1251 (Okl.Cr. 1982); Hays v.

State, 617 P.2d 223 (Okl.Cr. 1980); and Chaney v. State, 612 P.2d 269 (Okl.Cr. 1980); those reversed or modified, Johnson v. State, 665 P.2d 815 (Okl.Cr. 1983); Hatch v. State, 662 P.2d 1377 (Okl.Cr. 1983); Jones v. State, 660 P.2d 634 (Okl.Cr. 1983); Munn v. State, 658 P.2d 482 (Okl.Cr. 1983); Driskell v. State, 659 P.2d 343 (Okl.Cr. 1983); Boutwell v. State, 659 P.2d 322 (Okl.Cr. 1983); Odum v. State, 651 P.2d 703 (Okl.Cr. 1982); Brewer v. State, 650 P.2d 54 (Okl.Cr. 1982); Hall v. State, 650 P.2d 893 (Okl.Cr. 1982); Burrows v. State, 640 P.2d 533 (Okl.Cr. 1982); Franks v. State, 636 P.2d 361 (Okl.Cr. 1981); Irvin v. State, 617 P.2d 588 (Okl.Cr. 1980); and in particular, to those involving murder in the course of robbery, Johnson v. State, 665 P.2d 815 (Okl.Cr. 1983); Ake v. State, 663 P.2d 1 (Okl.Cr. 1983); Smith v. State, 659 P.2d

330 (Okl.Cr. 1983); Irvin v. State, 617 P.2d 588 (Okl.Cr. 1980); and, Hays v. State, 617 P.2d 223 (Okl.Cr. 1980).

The judgment and sentence of death is AFFIRMED.

BUSSEY, P.J., and BRETT, J., concur.